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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

TRAVELL PHILLIPS,

Defendant and Appellant.

B262251

(Los Angeles County
Super. Ct. No. TA131884)

APPEAL from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Affirmed and remanded.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Travell Phillips appeals from a judgment after a jury convicted him of possessing a controlled substance for sale and found true the allegation that he committed the crime for the benefit of and in association with a criminal street gang. Phillips argues there is no substantial evidence to support the conviction for possession of a controlled substance for sale or the true finding on the gang allegation. Because there was substantial evidence to support both, we affirm the conviction and true finding but remand for a new sentencing hearing.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Gang Activity at the Nickerson Gardens Housing Project*

Nickerson Gardens is a large government housing project that is the center of activities of the Bounty Hunter Bloods, a criminal street gang. Gang members conduct an extensive drug trade in the project. Male members of the Bounty Hunter Bloods commonly pay females who live in Nickerson Gardens to use their apartments to sell drugs. Working in an apartment unit, these gang members line up rocks of cocaine on a kitchen cutting board and sell individual rocks of cocaine for \$5, \$10, and \$20.

Sellers often work with partners to protect against robberies and to divide up the tasks associated with selling drugs. For example, one person, the “door man,” may open the door and serve as a lookout for law enforcement while his partner, the “board man,” sells the drugs from the cutting board and collects the money.

Police officers assigned to investigate Nickerson Gardens and the Bounty Hunter Bloods have learned that drug dealers use various methods to prevent officers from gaining access to units suspected of housing illegal activity, or at least to delay officers’ entry into a unit. One method involves “pinning” the metal front and back doors of the units. Residents or gang members who are selling drugs in the units drill a hole several inches deep into the concrete floor next to the door inside the unit and place a bolt of metal, such as a piece of rebar, into the hole, which acts as a reinforcement and prevents someone from pushing the door open from the outside. Pinning the door in this way allows gang members to delay police officers trying to enter the unit because the officers have to get past the pin using a hook or battering ram, which gives the individuals inside time to destroy evidence of drug sales.

Phillips is not a member of the Bounty Hunter Bloods, but is or was a member of another Blood gang, the Family Swans.

Ronald Brim, Phillips's codefendant in the first trial,¹ is an active member of the Bounty Hunter Bloods. Brim is also the boyfriend of Phillips's half-sister and the father of her child. Phillips has two brothers who are members of the Bounty Hunters. Although Phillips is not a member of the Bounty Hunters, he spends time near or inside Nickerson Gardens, lived in Nickerson Gardens until he was 14 years old, and is well liked there. In addition, Phillips's family lived near Nickerson Gardens in an area claimed by Bounty Hunter Bloods. According to a police officer knowledgeable about Los Angeles street gangs, "housing development gangs" commonly have members whose family members are in different gangs.

B. *Execution of the Search Warrant on Unit 350*

On January 30, 2014 a group of police officers, including Officer Manuel Moreno, Officer Jonathan Vander Le, and Detective Erik Shear, approached the back door of unit 350 of Nickerson Gardens to execute a search warrant. The officers

¹ In the first trial, the jury convicted Brim of possessing a controlled substance while armed with a firearm, possessing a controlled substance for sale, and possessing a firearm as a felon. The jury found true the allegation that Brim committed these crimes for the benefit of and in association with the Bounty Hunters criminal street gang. The jury hung on the charge against Phillips, and the People retried the case against him. This appeal is from the second trial.

chose the back door because drug sellers usually use the back door for sales, and it is less likely they will be diligent about pinning the door between each sale.

When the officers arrived at unit 350, Officer Moreno opened the exterior door with a key he had obtained from the housing authority in charge of Nickerson Gardens. As he was getting ready to use the key to open the second, interior door, someone inside the unit who appeared to be a crack cocaine user, later identified as James Smith, opened the door.²

When Smith first opened the door, Officer Moreno saw Brim holding a gun. Officer Moreno announced, “Police,” and someone attempted to push the door closed. As the door closed, Officer Moreno heard what sounded like someone throwing the gun into a kitchen drawer. After Officer Moreno pushed the door open again, Detective Shear entered the apartment and saw Brim and Phillips running towards the living room. Brim kept running up the stairs to the second level of the apartment, but Phillips fell to his knees at the base of the stairs.

Once inside the unit, the officers found in the kitchen a cutting board with rocks of cocaine on it, a razor blade used to cut the rocks into pieces, a hole drilled in the floor by the back door

² Smith exhibited signs of a chronic user of rock cocaine, including burnt fingertips and missing teeth, and Smith admitted he smoked crack cocaine.

and two bolts nearby, two scales, cash in small denominations in a drawer near the kitchen counter top, and, in the same drawer, the .357 caliber revolver Brim had been holding when the officers first opened the door to the apartment. The officers also observed a television with a paused video game in the kitchen.

The police officers arrested Phillips at the bottom of the stairs. Phillips did not have in his possession any money, drugs, or a razor blade. The officers also arrested Brim, who had locked himself in a bathroom upstairs. Brim had several hundred dollars in his possession.

Officer Vander Le briefly interviewed Brim and Phillips at the police station. Phillips told Officer Vander Le there was cocaine in the apartment. Officer Vander Le also interviewed Nikkie Walters, who lived in unit 350 and had arrived home during the search. According to Officer Vander Le, Walters told him during the interview that she rented the unit to Brim and Phillips to sell drugs, and she received a portion of the profits in return. Officer Vander Le recorded the interview on his cellular phone and used the recording to generate his written report, but he subsequently dropped his phone in his swimming pool before he had the opportunity to transfer the recording to a compact disc. officer Vander Le testified at trial about his interview with Walters and the destruction of his phone, and the People offered into evidence a receipt for the attempted repair of the phone. At

trial, Walters denied telling Officer Vander Le that she rented her apartment to Brim and Phillips for drug sales.³

On the day of the search, Smith told Officer Moreno that he was at Walters's apartment that day to buy rock cocaine. At trial, however, he denied making that statement and testified that he was at Walters's apartment because he was friends with Phillips and Brim and sometimes slept in the apartment. Smith testified that on January 30, 2014 Phillips let him in through the back door, and, although Smith denied he was in the apartment to buy cocaine, he admitted that he regularly smoked cocaine and he had \$5 and cocaine pipes in his possession that day.

C. *The Charges*

The People charged Phillips with a single count of possession for sale of a controlled substance. (Health & Saf. Code, § 11351.) The People alleged that Phillips committed the offense for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. (Pen. Code, § 186.22, subd. (b)(1)(A)).⁴ The People also alleged

³ The People charged Walters with maintaining a dwelling for the purpose of selling drugs, to which she pleaded guilty.

⁴ Undesignated statutory references are to the Penal Code.

that Phillips had suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), and had served one prior prison term within the meaning of section 667.5, subdivision (b).

D. *The Gang Expert Testimony*

Officer Francis Coughlin, an officer for 19 years with the Los Angeles Police Department and the senior lead officer in charge of curbing crime by Bounty Hunter gang members in Nickerson Gardens, testified as a gang expert for the People. Officer Coughlin testified that he had extensive knowledge about, and experience with, the Bounty Hunter Bloods. He explained that Nickerson Gardens is in the territory of the Bounty Hunters. Officer Coughlin testified that members of the Bounty Hunter Bloods commit crimes in Nickerson Gardens, such as robbery, drug sales, weapons possession, shootings, and murders. He explained that, by committing these kinds of crimes, the gang members make the residents and other witnesses fearful of notifying law enforcement or testifying in court, which allows the gang members to continue their criminal activities. Officer Coughlin testified that gang members inside Nickerson Gardens make “a lot of money on sales of narcotics” and that the gang “employs hundreds of its members annually” who profit from drug sales.

Officer Coughlin testified that he personally knew both Brim and Phillips. He knew Brim was a member of the Bounty Hunter Bloods because of his personal contacts with, and investigations of, Brim, and because Brim has Bounty Hunter Bloods tattoos and has admitted he is a member of the gang. Officer Coughlin also testified that he personally knew Phillips and has engaged him in consensual stops within the territory of the Bounty Hunter Bloods outside Nickerson Gardens. Officer Coughlin also knew that Phillips had a tattoo showing he was, or had been, a member of a different Blood gang, the Family Swans. Officer Coughlin testified that Phillips has one brother who is a “major player” in the Bounty Hunters, another brother who is an incarcerated member of the Bounty Hunters, and a third brother who is an incarcerated member of the Family Swans. Officer Coughlin testified that, although in the past there has been tension between the Bounty Hunters and the Family Swans, they are both Blood gangs and currently are not rivals.

Officer Coughlin opined, in response to a lengthy hypothetical mirroring the facts of this case, that there was “no way” Phillips did not know there were narcotics for sale in the apartment and, if he chose to be in the apartment, he was associated with Brim in selling cocaine for the benefit of the Bounty Hunter Bloods. Officer Coughlin explained that it would be very risky for someone, like Phillips, who has been arrested

before, to be in a location where narcotics are in plain view because that person would know he would be “looking at a lot of jail time” if he were arrested again. Therefore, it would be “common courtesy” for another gang member to tell him, if he came into the area, that he was in “a hot zone” and he “might not want to partake.” If he decided to stay, he would have made a “conscious choice to go in there [and] he’s going to have to do his part. He’s going to have to work.”

The prosecutor then added some facts to the hypothetical, including that there was a television in the kitchen connected to a video screen and that the Family Swan gang member was in the apartment without a gun, narcotics, or money in his possession. Officer Coughlin testified that those facts were consistent with an arrangement in which the Family Swan gang member was responsible for opening the door for buyers and the Bounty Hunter gang member was responsible for the sales. In that arrangement, the Family Swan gang member would not have any money because the person responsible for sales would have the money. Officer Coughlin concluded that, in his opinion, the crime in the hypothetical was committed for the benefit of the Bounty Hunter Bloods because successful drug sales benefit the gang. The Bounty Hunter gang members sell drugs for profit, which they use to buy more drugs from higher-up members of the Bounty Hunter Bloods. Because gang members are making

money selling drugs, they are “able to afford some of life’s necessities, as well as luxuries, without seeking employment.” Because gang members do not have to spend time working at regular jobs, “they’re going to congregate outside by themselves, meeting, reinforcing . . . fear generated by crimes [they] commit[], murders, robberies, rapes -- fear that makes people not want to come to court to testify, not want to notify the police about their activities, not want to even get in the way. As a result, the gang feels like it can commit . . . crimes without fear of interference, and that benefits the gang as a whole tremendously.”

E. *The Verdict and the Sentence*

The jury found Phillips guilty of one count of possession for sale of a controlled substance (Health & Saf. Code, § 11351) and found true the allegation that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)). Phillips admitted the truth of his prior felony conviction under sections 1170.12 and 667, subdivision (a). After striking the prior felony conviction, the court sentenced Phillips to an aggregate prison term of eight years.

DISCUSSION

A. *Substantial Evidence Supports Phillips’s Convictions*

“Our role when reviewing the sufficiency of the evidence is to evaluate the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Moreover, we must accept any logical inferences the jury could have drawn from any circumstantial evidence, because ‘it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt.’” (*People v. Ramos* (2016) 244 Cal.App.4th 99, 104; see *People v. Zamudio* (2008) 43 Cal.4th 327, 357-358.) A reversal ““is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].””” (*People v. Manibusan* (2013) 58 Cal.4th 40, 87; see *People v. Martinez* (2014) 226 Cal.App.4th 1169, 1187.)

The elements of possession for sale of a controlled substance are (1) the presence of a specified controlled substance, in a sufficient quantity and in a usable form; (2) possession, which may be physical or constructive, exclusive or joint; (3) knowledge of the fact of possession and of the illegal character

of the substance; and (4) a specific intent to sell the substance. (*People v. Montero* (2007) 155 Cal.App.4th 1170, 1175-1176.) Phillips challenges only the “possession” element, arguing that the People did not prove he exercised “dominion and control” over the rock cocaine. Although some courts have described the possession requirement as the exercise of “dominion and control” over the controlled substance (see, e.g., *People v. Busch* (2010) 187 Cal.App.4th 150, 161), the phrase is “redundant and archaic” and “merely a different way of saying the defendant possessed the substance physically or constructively.” (*People v. Montero, supra*, 155 Cal.App.4th at pp. 1176-1177; see *People v. Thomas* (2012) 53 Cal.4th 1276, 1284 (“one may become criminally liable for possession for sale . . . of a controlled substance, based upon either actual or constructive possession of the substance,” and “[c]onstructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another”].)⁵ Circumstantial evidence and any reasonable inferences drawn from it may establish possession.

⁵ CALCRIM No. 2302, which the trial court read to the jury, explains the possession requirement as follows: “Two or more people may possess something at the same time. [¶] A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person.”

(*People v. Martin* (2001) 25 Cal.4th 1180, 1184; see *In re Z.A.* (2012) 207 Cal.App.4th 1401, 1427.)

1. *There Was Substantial Evidence That Phillips Possessed Cocaine for Sale*

Although Phillips correctly notes that when the police searched Walters's apartment they did not find drugs or drug paraphernalia in his possession, there was substantial evidence that Phillips had control over both the cocaine and the apartment where the police found the cocaine. First, there was evidence that Walters gave permission to Brim and Phillips to stay in her apartment and to sell drugs there. Second, when the police executed the search warrant later that afternoon, Brim and Phillips were still there, with the cocaine in plain view. (See *People v. Williams* (1971) 5 Cal.3d 211, 215 [defendant had control over drugs found in plain sight on the floor in front of the seat where he was sitting in a companion's car].) Third, there was circumstantial evidence that Phillips, as the "door man," had control over the cocaine in the apartment, including Officer Coughlin's testimony describing how gang members work in pairs, one as the "board man" and one as the "door man," the television set up in the kitchen for the "door man" to watch while waiting for customers, and Smith's admission that Phillips opened the door for him. Finally, officers found \$1,800 worth of

rock cocaine, set up in pieces for sale on a cutting board, not far from where Phillips was standing.

Phillips argues that the statement by Walters that she rented her apartment to Brim and Phillips for them to sell drugs was “the only evidence” connecting Phillips to a sales operation in the unit, and Walters disputed making the statement. Although at trial Walters denied making the statement, Officer Vander Le testified that Walters admitted to him on the day of the search that she rented her apartment to Brim and Phillips to sell cocaine. Phillips argues that Officer Vander Le’s explanation that he lost the recording of the interview when he dropped his phone in a swimming pool was not credible. The jury, however, believed Officer Vander Le’s testimony, which was supported by the receipt for the attempted phone repair, and we do not reweigh or reevaluate the credibility of witnesses. (See *People v. Albillar* (2010) 51 Cal.4th 47, 60; *People v. Vasquez* (2015) 239 Cal.App.4th 1512, 1516.) In any event, as noted, there was substantial evidence other than Walters’s statement that Phillips had constructive possession of the rock cocaine in the apartment.⁶

⁶ Phillips also argues that Officer Coughlin’s opinion testimony that Phillips was a lookout or “door man” was unsupported because Smith, not Phillips, opened the door and tried to shut it again when the police arrived. This argument

2. *There Was Substantial Evidence That Phillips
Aided and Abetted the Sale of Cocaine*

Substantial evidence also supports the jury’s verdict on the theory that Phillips aided and abetted Brim in committing the crime of possession of cocaine for sale.⁷ A defendant aids and abets the commission of a crime when he or she (1) acts with knowledge of the unlawful purpose of the perpetrator, (2) acts with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, and (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime. (*People v. Smith* (2014) 60 Cal.4th 603, 611.) For the intent requirement, “an aider and abettor will “share” the perpetrator’s specific intent when he or she knows the full extent of the perpetrator’s criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator’s commission of the crime.” (*People v. Maciel* (2013) 57 Cal.4th 482, 518; see *People v. Williams* (2009) 176 Cal.App.4th 1521, 1528.) In determining the knowledge and intent of an aider and abettor, the trier of fact may consider,

ignores Smith’s statement that Phillips initially opened the door for him.

⁷ The court instructed the jury on aiding and abetting pursuant to CALCRIM No. 401. Philips does not challenge this instruction.

among other factors, the defendant's "presence at the scene of the crime, failure to take steps to attempt to prevent the commission of the crime, companionship, flight, and conduct before and after the crime." (*People v. Garcia* (2008) 168 Cal.App.4th 261, 273; see *People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1065-1066; *People v. Miranda* (2011) 192 Cal.App.4th 398, 407.) "Whether a person has aided and abetted in the commission of a crime is a question of fact, and on appeal all conflicts in the evidence and attendant reasonable inferences are resolved in favor of the judgment." (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5; see *Garcia, supra*, at pp. 272-273.)

The evidence that Phillips had constructive possession of the rock cocaine is also substantial evidence that Phillips knew of Brim's unlawful purpose and that he intended to help Brim facilitate drug sales. Phillips's admission to police that he knew there was rock cocaine in the apartment, Smith's statement that Phillips let him in to unit 350, the presence of a television with video games near the kitchen door, and Officer Coughlin's testimony that drug sales in Nickerson Gardens often occur with a "board man" and a "door man," constitute substantial evidence that Phillips knew Brim was selling rock cocaine and that he intended to help him by acting as the "door man." (See *People v. Campbell* (1994) 25 Cal.App.4th 402, 409 [watching for others

who might approach is “textbook example of aiding and abetting”].)

There was also evidence of the other factors indicating that Phillips had the requisite intent for aiding and abetting Brim in possessing a controlled substance for sale. Phillips was present in unit 350 where Brim possessed rock cocaine for sale; Phillips took no steps to prevent the sale of rock cocaine; and Phillips knew Brim -- his sister was Brim’s girlfriend and his brothers were Bounty Hunter gang members. And when the police officers entered the apartment, Phillips ran from the living room to the stairs (although it was disputed whether Phillips fell at the base of the stairs or he surrendered). (See *People v. Garcia*, *supra*, 168 Cal.App.4th at p. 273 [evidence of companionship with accomplice, presence at the scene, participation in crime, and flight from crime scene, supported conviction for murder as an aider and abettor].)

B. *There Was Substantial Evidence To Support the Jury’s True Finding on the Criminal Street Gang Allegation*

“Section 186.22, subdivision (b)(1), enhances the sentence for ‘any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist

in any criminal conduct by gang members.” (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170.) The court may impose the enhancement only if the prosecution establishes beyond a reasonable doubt that (1) the defendant committed a felony (a) for the benefit of, (b) at the direction of, or (c) in association with a criminal street gang; and (2) that in connection with the felony, the defendant harbored the specific intent to (a) promote, (b) further, or (c) assist in any criminal conduct by gang members. (*People v. Albillar, supra*, 51 Cal.4th at p. 51; see *People v. Rios* (2013) 222 Cal.App.4th 542, 564 [to prove a gang allegation, “the prosecution must prove that the underlying crime was ‘committed for the benefit of, at the direction of, or in association with any criminal street gang’ (the gang-related prong), ‘with the specific intent to promote, further, or assist in any criminal conduct by gang members’ (the specific intent prong)”].)

We review a challenge to the jury’s true finding on a gang allegation under section 186.22, subdivision (b)(1), for substantial evidence. (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1366.) “In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact

could find the defendant guilty beyond a reasonable doubt.

[Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.

[Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] "A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.""

(*People v. Livingston, supra*, 53 Cal.4th at p. 1170.)

Although an expert on criminal street gangs generally may not testify about whether a defendant committed a particular crime, a gang expert may express an opinion, based on hypothetical questions that track the evidence, whether the crime, if the jury finds it occurred, was for a gang-related purpose. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; see *People v. Johnson* (2014) 229 Cal.App.4th 910, 921, fn. 34 ["testimony regarding gang culture and habits . . . is permissible in cases where the . . . gang enhancement is alleged"].) The gang expert's opinion may constitute substantial evidence supporting a true finding on the gang allegation if the hypothetical facts presented to the gang expert are "properly rooted in the evidence." (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930; see *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4 ["[a] gang expert may render an opinion that facts assumed to be

true in a hypothetical question present [an] example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence”]; see also *People v. Sanchez* (2016) 63 Cal.4th 665, 685 [gang experts may “rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven,” but they may not “present, as facts, the content of testimonial hearsay statements”].)

1. *There Was Substantial Evidence That Phillips Committed the Crime for the Benefit of the Bounty Hunters*

Because Officer Coughlin’s testimony was “rooted in facts shown by the evidence,” it was substantial evidence that Phillips committed the crime for the benefit of a criminal street gang. (See *People v. Gonzalez, supra*, 126 Cal.App.4th at p. 1551, fn. 4.) Officer Coughlin testified that he was inside Nickerson Gardens every day and was familiar with the criminal activity that members of the Bounty Hunter Bloods engage in there. The prosecutor provided Officer Coughlin with specific, hypothetical facts about a Bounty Hunter Bloods gang member and a Family Swan Bloods gang member present in an apartment in Nickerson Gardens with \$1,800 of cocaine displayed in pieces on a cutting board, a gun, a razor blade, two scales, pinned doors, someone

who appeared to be a rock cocaine user and buyer, and a television screen with a video game set up in the kitchen. Not only did Officer Coughlin opine that these facts showed the two gang members were selling drugs in the apartment, Officer Coughlin explained how selling narcotics benefits the Bounty Hunters as well as the two individuals: “When they have sellers selling inside their development making money, those individuals usually reinvest that money into additional narcotics. It’s been my experience when they reinvest that money, they buy from higher members of the Bounty Hunter Blood members.” Officer Coughlin further testified that, by living off the proceeds of the drug sales, Bounty Hunters gang members can support themselves without having legal employment, which in turn allowed them to congregate in Nickerson Gardens and the surrounding neighborhood. Thus, selling cocaine in Nickerson Gardens allowed members of the Bounty Hunter Bloods to create and sustain an atmosphere in the neighborhood of fear and intimidation, which Officer Coughlin testified greatly benefited the gang members. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 609 [“[e]xpert testimony is . . . relevant and admissible to explain how a gang benefits from drug sales”]; *People v. Ferraez, supra*, 112 Cal.App.4th at p. 930 [“the gang expert’s testimony was necessary to explain to the jury how a gang’s reputation can be enhanced through drug sales”].)

Arguing that Officer Coughlin’s opinion had insufficient factual support, Phillips compares his case to *In re Frank S.* (2006) 141 Cal.App.4th 1192, *People v. Ramon* (2009) 175 Cal.App.4th 843, and *People v. Ochoa* (2009) 179 Cal.App.4th 650. All three cases are distinguishable.

In *In re Frank S.*, *supra*, 141 Cal.App.4th 1192 the court concluded that the gang expert’s testimony was insufficient because the expert “simply informed the judge of her belief of the minor’s intent” in possessing a weapon, and the prosecution presented “no evidence other than the expert’s opinion regarding gangs in general and the expert’s improper opinion on the ultimate issue to establish that possession of the weapon was ‘committed for the benefit of . . . [a] criminal street gang’ [Citation.] The prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense.” (*Id.* at p. 1199.) Similarly, in *People v. Ramon*, *supra*, 175 Cal.App.4th 843, the gang expert “simply informed the jury of how he felt the case should be resolved” and relied on only two facts to support his opinion that the defendants committed the crimes of receiving a stolen vehicle and possession of a firearm for the benefit of a criminal street gang: the defendants were members of a gang and the police stopped them in gang territory. (*Id.* at pp. 849, 851.) The expert opined that, because individuals

could use the gun and the stolen vehicle to facilitate the commission of a crime, and because the gang committed crimes, the defendants must have been acting on behalf of the gang. (*Ibid.*) The court concluded that the possibility that the defendants were acting for the benefit of the gang was only speculation, which was not substantial evidence. (*Id.* at p. 851; see *People v. Ochoa*, *supra*, 179 Cal.App.4th at p. 662 [gang expert's testimony that carjacking by a gang member would always be for the benefit of a gang without other evidence, such as display of gang signs, gang clothing, or that defendant committed crime with another gang member or with gang's permission, did "“nothing more than inform the jury how [the expert] believed the case should be decided”"].)

Unlike the experts in these cases, Officer Coughlin based his testimony on his extensive experience with how members of the Bounty Hunters sell drugs inside Nickerson Gardens. Officer Coughlin also knew Phillips personally, his gang associations, and his relationship to Brim, the Bounty Hunters, and Nickerson Gardens. He based his opinion not only on this general knowledge about the Bounty Hunters, Nickerson Gardens, and Phillips's relationship to the Bounty Hunters, but also on a lengthy hypothetical including specific facts that closely tracked the evidence in this case. Because Officer Coughlin's opinion was "rooted in the facts," his testimony was sufficient to support the

jury's true finding on the gang allegation. (See *People v. Gonzalez, supra*, 126 Cal.App.4th at p. 1551, fn. 4.)

2. *There Was Substantial Evidence That Phillips Had the Requisite Specific Intent*

Section 186.22, subdivision (b), the gang enhancement statute, “does not risk conviction for mere nominal or passive involvement with a gang. Indeed, it does not depend on membership in a gang at all. Rather, it applies when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang.” (*People v. Albillar, supra*, 51 Cal.4th at pp. 67-68.) “Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense.” (*People v. Rios, supra*, 222 Cal.App.4th at pp. 567-568.) Circumstantial evidence satisfies the intent requirement if the “evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, [from which] the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.” (*Albillar*, at p. 68; see *People v. Franklin* (2016) 248 Cal.App.4th 938, 949.) “Evidence of a defendant’s state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as

direct evidence to support a conviction.” (*People v. Rios, supra*, 222 Cal.App.4th at pp. 567-568.)

There was substantial circumstantial evidence that Phillips intended to assist Brim, as a member of the Bounty Hunter Bloods, with the sale of cocaine. As noted, there was evidence that the Bounty Hunters have a specific method of selling drugs in Nickerson Gardens, with a “board man” and a “door man,” and that Brim and Phillips were filling those roles. There also was evidence that Phillips knew Brim was a member of the Bounty Hunter Bloods because of his sister’s relationship with Brim and his brothers’ membership in the Bounty Hunter Bloods. This knowledge of Brim’s gang membership is substantial evidence that Phillips intended to assist criminal conduct by a gang member. (See, e.g., *People v. Leon* (2008) 161 Cal.App.4th 149, 163 [evidence defendant intended to commit the offenses in association with someone he knew was a gang member was sufficient for the jury to “reasonably infer that [defendant] harbored the ‘specific intent to promote, further, or assist in any criminal conduct by gang members’”]; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 (“[c]ommission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime”].)

C. *The Matter Must Be Remanded for a New Sentencing Hearing*

The transcript of the sentencing hearing reflects that the trial court imposed the upper term of four years for possession for sale of a controlled substance, plus the upper term of four years for the gang enhancement pursuant to section 186.22, subdivision (b)(1)(A). The transcript also reflects that the trial court struck the prior serious or violent felony conviction under section 1170.12 and the prior serious felony conviction under section 667, subdivision (a), as “a nullity.” The minute order and the parties in their briefs, however, state that the trial court imposed the middle term of three years for possession for sale of a controlled substance, plus five years for the prior serious felony conviction under section 667, subdivision (a). The minute order and the parties in their briefs also state that the court imposed the middle term of three years for the criminal street gang enhancement under section 186.22, subdivision (b)(1)(A), but stayed execution of that enhancement. The oral pronouncement of judgment, however, prevails over the minute order and abstract of judgment. (*People v. Hartley* (2016) 248 Cal.App.4th 620, 637; *People v. Sharret* (2011) 191 Cal.App.4th 859, 864.)

We asked the parties to submit supplemental briefs on whether the trial court imposed an unauthorized sentence by striking the prior serious felony conviction enhancement under

section 667, subdivision (a). (See *People v. Scott* (1994) 9 Cal.4th 331, 354 [“the ‘unauthorized sentence’ concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal”].) We noted that, although the trial court had discretion to strike the prior serious or violent felony conviction under section 1170.12, the court did not have discretion to strike the prior serious felony conviction under section 667, subdivision (a). (See § 1385, subd. (b); *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1560-1561 [“[a] five-year section 667, subdivision (a) prior serious felony conviction enhancement may not be stricken pursuant to section 1385, subdivision (a) or any other provision of law”]; *People v. Jordan* (2006) 141 Cal.App.4th 309, 319 [“[w]hen the truth of the allegation of conviction of a crime qualifying for a five-year enhancement has been established, it is mandatory that the enhancement be imposed,” and “[c]ourts lack discretion to strike or stay allegations of prior serious felony conviction[s] under section [667], subdivision (a)(1)”].)

By striking the five-year enhancement under section 667, subdivision (a), the court imposed an unauthorized sentence. Although “[w]e may correct an unauthorized sentence on appeal despite failure to object below” (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1173), in light of the discrepancy between the

oral pronouncement of judgment and the minute order, in this case a remand for resentencing is appropriate.⁸

DISPOSITION

The conviction and true finding on the criminal street gang allegation are affirmed. The matter is remanded to the trial court with directions to conduct a new sentencing hearing. The trial court is to prepare a corrected abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.

⁸ In their supplemental brief, the People point out the trial court also neglected to address the prior prison term allegation pursuant to section 667.5, subdivision (b), which the People assert Phillips admitted and the trial court should have imposed and struck. The trial court can address this enhancement at the resentencing hearing.